No. 95-1858

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D.; SAMUEL C. KLAGSBRUN, M.D.; and HOWARD A. GROSSMAN, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF SEVEN PRESENT AND FORMER COMMISSIONERS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND A FORMER CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PETITIONERS

William C. Porth
Counsel of Record
James S. Chase
ROBINSON & McELWEE
500 Virginia Street East
600 United Center
Post Office Box 1791
Charleston, West Virginia 25326
(304) 344-5800

Counsel for Carl A. Anderson, Robert P. George, Constance Horner, Russell G. Redenbaugh, William B. Allen, Esther Gonzalez-Arroyo Buckley, Robert A. Destro and Evan J. Kemp, Jr.

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

No. 95-1858

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D.; SAMUEL C. KLAGSBRUN, M.D.; and HOWARD A. GROSSMAN, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF SEVEN PRESENT AND FORMER COMMISSIONERS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND A FORMER CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PETITIONERS

Seven current and former Commissioners of the United States Commission on Civil Rights ("Civil Rights Commission") Carl A. Anderson, Robert P. George, Constance Horner, Russell G. Redenbaugh, William B. Allen, Esther Gonzalez-Arroyo Buckley, and Robert A. Destro ("Commissioners") hereby request, pursuant to Rules 21.2(b) and 37.2 of the Rules of this Court, leave to file the accompanying brief as

amici curiae in support of petitioners. These Commissioners are joined as *amici* by Evan J. Kemp, Jr., a former Chairman of the Equal Employment Opportunity Commission, who throughout his life and career has sought to defend the rights of handicapped people and ensure their full integration into society. *Amici* have obtained consent from petitioners' counsel to file this brief.[1] Counsel for respondents, however, refused to grant consent.

The Commissioners take this action in their individual capacities and not on behalf of the Civil Rights Commission itself. As a matter of policy, the Civil Rights Commission does not assume the role of *amicus curiae*. The named Commissioners, however, mindful of the historical achievements of the Commission, are motivated by their dedication to its ideals and believe that they can offer a useful perspective on the issues in this case.

Created as a part of the Civil Rights Act of 1957, the Civil Rights Commission has played a crucial -- and controversial -- role in our nation's efforts to assure equal protection before the law. *See* 42 U.S.C. § 1975c(2-3) (1983). From the beginning, its primary function has been to investigate facts and to make recommendations concerning the need to revise laws and regulations which deal with equal protection. *Id.* Since 1957, it has served as a bellwether, charting the direction of needed advances in civil rights and sounding the alarm when civil rights are threatened.

In keeping with its mandate, the Civil Rights Commission and its commissioners have individually and collectively braved great political and personal odds to bring attention to civil rights problems ignored or poorly understood by both courts and policy makers. The first commissioners were subjected to physical threats, and their confirmation hearings

---

[1] Letters of consent from petitioners' counsel have been filed with the Clerk of the Court.

even included questions concerning payment of funeral expenses should they be killed in the line of duty. In the 1970s, the Civil Rights Commission conducted some of the earliest public debates over the concept of "structural racism" and the implications of that concept on the direction of civil rights enforcement policy. In the early 1980s, several *amici* were on the cutting edge of debates concerning the scope and direction of affirmative action programs of the sort this Court invalidated in *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S.Ct. 2097, (1995), and held extensive hearings designed to foster debate over programs which might be developed as acceptable substitutes.

The case at bar has grave implications for an issue which has long been of great concern, both to the Civil Rights Commission itself, and to *amici* -- medical discrimination against racial minorities and persons with disabilities. At the urging of several of the Commissioners, the Civil Rights Commission held extensive hearings on discrimination against persons with disabilities in our nation's health care system. *See* United States Commission on Civil Rights, *Medical Discrimination Against Children With Disabilities* (1989). At those hearings, assurances were given that effective safeguards existed to protect against violation of the rights of the subject patients. As the Civil Rights Commission's report shows only too well, however, the temptations to undervalue the right of those patients are strong, and the vaunted safeguards sadly inadequate.

In the case at bar, *amici* see cause for similar misgivings. In their judgment, the legal right to physician-assisted suicide recognized by the Second Circuit is misconceived, and they have no confidence that, once created, any safeguards can be crafted sufficient to restrain it. *Amici* are concerned that the decision of the Court of Appeals does not adequately consider the substantive threat to the lives of the poor, persons with disabilities, and racial minorities, and others who have historically suffered discrimination in the provision of health services.

Amici thus believe that they offer a strong and unique perspective on this case as *amici curiae* which will assist this Court in evaluating the opinion of the United States Court of Appeals for the Second Circuit in *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) and deciding whether to grant the requested writ of certiorari.

Respectfully submitted,

William C. Porth
Counsel of Record
James S. Chase
ROBINSON & McELWEE

Counsel for Carl A. Anderson,
Robert P. George,
Constance Horner,
Russell G. Redenbaugh,
William B. Allen,
Esther Gonzalez-Arroyo Buckley,
Robert A. Destro and
Evan J. Kemp, Jr.

June 17, 1996

QUESTIONS PRESENTED

1. Should this Court grant certiorari to settle the question of whether, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, a state retains a legitimate interest in prohibiting physician assisted suicide while allowing terminally ill, mentally competent patients to refuse artificial life support?
2. Should this Court grant certiorari to resolve a conflict between the United States Court of Appeals for the Second Circuit and a state court of last resort on the issue of whether the Equal Protection Clause prohibits the states from banning physician assisted suicide?

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Publications

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

No. 95-1858

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D.; SAMUEL C. KLAGSBRUN, M.D.; and HOWARD A. GROSSMAN, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF ON BEHALF OF SEVEN PRESENT AND FORMER COMMISSIONERS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND A FORMER CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Carl A. Anderson, Robert P. George, Constance Horner, Russell G. Redenbaugh, present Commissioners of the United States Commission on Civil Rights ("Civil Rights Commission"), William B. Allen, Esther Gonzalez-Arroyo Buckley, Robert A. Destro, former Commissioners of the Civil Rights

Commission, and Evan J. Kemp, Jr., former Chairman of the Equal Employment Opportunity Commission, respectfully submit this brief as *amici curiae* in support of petitioner. The interest of these individuals as *amici curiae* is fully set forth in the Motion for Leave File Brief as *Amici Curiae*, printed herewith *ante*.

SUMMARY OF ARGUMENT

Amici are deeply concerned about the implications of the newly-discovered right to physician-assisted suicide for the civil rights of the poor, persons with disabilities, and racial minorities. Based on their experience in striving to protect the civil rights of all Americans, *amici* find little comfort in the Second Circuit's express limitation of that right to competent, terminally ill adults or in its assurance that adequate safeguards can be crafted to prevent the abuse of that right. In their estimation, physician-assisted suicide, by its intrinsic nature and the reasoning offered in defense of its decriminalization, contains the seeds of both its expansion and its abuse. The Court of Appeals' decision should be reviewed by this Court and reversed because of that decision's fundamental illogic, its lack of sound constitutional or legal foundation, and its usurpation of a field of decision-making properly reserved to a state's citizens and their elected lawmakers. In addition, there is ample justification for New York's criminalization of all assisted suicide in the rational judgment that any exception to a thorough prohibition (such as an acceptance of physician-assisted suicide in certain instances) would pose an unacceptable risk to its citizens' lives, health, and access to uncompromised medical care -- a risk that can only be heightened in the case of the most vulnerable members of society.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S EQUAL PROTECTION ANALYSIS FAILS TO RECOGNIZE SEVERAL RATIONAL BASES FOR NEW YORK'S DECISION TO PROHIBIT ASSISTED SUICIDE GENERALLY, INCLUDING PHYSICIAN-ASSISTED SUICIDE.

The Second Circuit recognized that, to pass muster under the applicable equal protection analysis, New York's law against assisted suicide (as applied to assistance from any source, including physicians) need only possess a rational basis. *Quill v. Vacco*, 80 F.3d 716, 725-727 (2d Cir. 1996). *Amici* suggest that, among the many rational justifications for New York's law, are (1) protecting its most vulnerable citizens, (2) preserving the integrity of the medical profession, and (3) guarding against the potential for abuse that would accompany any less sweeping prohibition.

a. The Second Circuit's Decision Does Not Adequately Consider the Threat Posed By Physician-Assisted Suicide to the Poor, Persons with Disabilities, and Racial Minorities Who Historically Have Suffered Discrimination in the Provision of Medical Services.

The Court of Appeals ignored as a rational basis for New York's law prohibiting assisted suicide, the State's desire to protect its most vulnerable citizens from the most extreme consequences of medical exploitation or neglect. To the contrary, the court's concern with such persons was not that their deaths might be encouraged or unduly facilitated by the medical establishment, but that they might not have sufficient access to the right to embrace suicide: "[W]ith respect to the protection of minorities, the poor and the non-mentally handicapped, it suffices to say that these classes of persons are entitled to treatment equal to that afforded to all those who now

may hasten death by means of life-support withdrawal". *Quill v. Vacco*, 80 F.3d 716, 730 (2d Cir. 1996). *Amici* respectfully submit that this conclusion reflects an inadequate awareness of the history of discrimination in the provision of medical services to the poor, persons with disabilities, and racial minorities. Moreover, *amici* suggest that the Court of Appeals' partial invalidation of New York Penal Law Sections 125.15(3) and 120.30 poses an unprecedented threat of exploitation in the delivery of health care.

In reviewing the specific issue of physician-assisted suicide, the New York State Task Force on Life and the Law ("New York State Task Force"), convened in 1985 by Governor Mario Cuomo, rejected the proposed repeal or amendment of the New York law on assisted suicide for precisely this reason. It's conclusion could not be any clearer or more deliberate:

> [I]t must be recognized that assisted suicide and euthanasia will be practiced through the prism of social inequality and prejudice that characterizes the delivery of services in all segments of society including health care. Those who will be most vulnerable to abuse, error, or indifference are the poor, minorities, and those who are least educated and least empowered. This risk does not reflect a judgment that physicians are more prejudiced or influenced by race and class than the rest of society -- only that they are not exempt from the prejudices manifest in other areas of our collective life.
>
> While our society aspires to eradicate discrimination . . . we consistently fall short of our goal. The costs of this failure with assisted suicide and euthanasia would be extreme. Nor is there any reason to believe that the practices, whatever safeguards are erected, will be unaffected by the broader social and medical context in which they will be operating. This assumption is naive and unsupportable.

New York State Task Force on Life, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (May 1994).

Amici agree entirely with this conclusion of the New York State Task Force. Indeed, this conclusion is strikingly consistent with findings of the Civil Rights Commission itself in its multi-year study of discrimination in the provision of medical services to children born with severe disabilities. *See* United States Commission on Civil Rights, *Medical Discrimination Against Children with Disabilities* (1989). (For the convenience of the Court several copies of this report have been lodged with the Clerk.) The Civil Rights Commission found that "[a] significantly high incidence of medical discrimination against children with disabilities exists that is part of a much larger pattern of medical care discrimination against people with disabilities." *Id.* at 8. In addition, the Civil Rights Commission reported that:

> The grounds typically advanced to support denial of lifesaving medical treatment or food and fluids are based on erroneous judgments concerning the quality of life of a person with a disability or on social judgments that such a person's continued existence will impose an "unacceptable" burden on his or her family or on the Nation as a whole. These judgments are often grounded in misinformation, inaccurate stereotypes, and negative attitudes about people with disabilities.

Id. at 12. Although *amici* realize that certain circumstances of disabled patients denied medical services at the beginning of life may differ from circumstances pertaining to disabled, or other, patients facing life-and-death decisions at the end of life, nonetheless, like the New York Task Force, *amici* respectfully suggest that it is "naive and unsupportable" to suppose that decisions affecting physician-assisted suicide would not be subject to the same pressures and attitudes.

Amici assert that the context in which such decisions will be made cannot be separated from the historic reality of unequal health care and the health status of minorities in American society. In 1984, Secretary of Health and Human Services Margaret Heckler established a departmental Task Force on Black and Minority Health to conduct the first comprehensive review of national minority health issues compiled into one federal report. *See* United States Department of Health and Human Services, *Report of the Secretary's Task Force on Black and Minority Health* (August 1985). This report stated that:

> Despite the unprecedented explosion in scientific knowledge and the phenomenal capacity of medicine to diagnose, treat, and cure disease, Blacks, Hispanics, Native Americans, and those of Asian/Pacific Islander heritage have not benefited fully or equitably from the fruits of science or from those systems responsible for translating and using health sciences technology.

Id. at 1. The report continued that there has been "steady improvement in overall health status, while at the same time, persistent, significant health inequities exist for minority Americans." *Id.* at 2. What Secretary Heckler, in issuing this report, called this "tragic dilemma" remains with us still.

Perhaps it should be acknowledged, in light of the Second Circuit's inability to perceive any possible distinction between suicide and decisions of a patient to forego or discontinue life-supporting medical treatment, that, in the sphere of life support decisions, as well, the poor, persons with disabilites, and racial minorities face disparate treatment. That problem, too, entails issues of the deprivation of civil rights and needs to be addressed. But the persistence of serious risks in one sphere is a poor reason to strike down effective protections already existing in another sphere. Such an action makes as little sense as demolishing fire houses and police

stations in affluent suburbs, in the name of equal treatment, because there may be insufficient fire and police protection in the inner city.

Given the tragic vulnerability of the poor, persons with disabilites, and racial minorities to medical exploitation and neglect, the Second Circuit erred in failing to perceive the protection of these citizens as a rational basis for New York's decision to ban all assisted suicide.

b. The Second Circuit Has Created Dangerous Dual Roles for Physicians -- to Promote Life and Health on Some Occasions and to Act Deliberately to Bring About Death on Others

Our nation faces difficult choices today with regard to the provision of medical care. Many of those choices derive from the interplay between the high costs of various medical procedures and the limited resources which many patients can command. There are strong and disturbing tendencies to allow full compassionate care to gravitate toward dollars, insurance companies to court the healthy and avoid the sick, and persons with diminished physical or mental capacities to be considered imprudent destinations for the allocation of more than minimal medical resources.

The young, the old, the sick, persons with disabilites, the poor, and racial minorities are dependent now more than ever before on the high ethical standards of medical professionals. In the absence of such high standards, the physical and mental impairments experienced by such persons when they are in dire need of medical care (compounded by age-related inabilities to act aggressively in their own defense) are likely to subject them to the devaluation of their incommensurable worth as human beings. Doctors and nurses must be the champions of last resort of many who lack any other advocates.

The Second Circuit has now accepted the proposition that patients themselves can rationally conclude that their

physically or mentally diminished lives are no longer worth living and be entitled to a physician's assistance in committing suicide. If such conclusions are deemed rational when made by one person about himself, they cannot be considered any less rational when made about others. Whatever the medical factors may be that are deemed to justify suicide, they can be perceived by third parties and used to justify a decision for death, whether or not the patient may concur.

This poses a dreadful danger of infecting physicians' attitudes, in both subtle and less subtle ways. *Amici* see ample evidence of a pre-existing propensity in some doctors to be negatively influenced by various defects and disabilities in their treatment decisions, as reflected in the Civil Rights Commission's 1989 report *Medical Discrimination Against Children with Disabilities*, *supra*. Involving doctors both as accessories in acts of suicide and as evaluators of the rationality of patients' suicide decisions seems likely to exacerbate the danger of more doctors drifting away from a pure and strict allegiance to the ancient Hippocratic Oath. Instead, we are likely to see doctors becoming more inclined (as well-educated professionals prone to value highly their own judgments) to reach their own conclusions about which cases appropriately call for the exercise of their skill as healers and which for their unique legally conferred authority to grant final surcease. Even if there is no dramatic embrace of non-voluntary euthanasia, there is bound to be a dangerous tug in that direction as habits of mind and practice change.

In the judgment of *amici*, states are wholly justified in refusing to countenance anything which contributes to the dilution or contamination of a physician's single-minded devotion to fostering the life and health of his patients.

c. The Second Circuit Has Refused to Recognize New York's Right to Command the Broad Proscription of Conduct Which It Deems So Susceptible of Abuse as to Be Intolerable.

Amici believe that a state can rationally and legitimately conclude that some activities involve such serious harms and possess so great and unavoidable a potential for abuse that they should be prohibited absolutely. Thus, statutory rape laws certainly run counter to the fact that there may be individual cases where, say, a 14- or 15-year-old can and does grant knowing consent to sexual relations. *See e.g.*, Model Penal Code §§ 213.3(1)(a) and 213.4(6) (1974). But many states have decided that sexual abuse of minors is so harmful, and recognition of a limited sphere of permitted sexual relations with minors so susceptible of abuse, that they will prohibit such relations categorically.

Amici suggest that intentionally causing the death of a human being (including inciting or assisting a person to cause his own death) should be viewed in much the same way. The harm could not be greater (whether or not it is desired -- but then a desire in minors for sexual activity is not unheard of); and the potential for abuse is enormous. Even under a regime in which no opinion or authorization but a patient's own is given any weight, many pressures -- economic, professional, familial -- can be brought to bear to influence the patient's choice. Consider even the very slightest pressure imaginable. Why should any patient be made to feel that, by declining to embrace suicide during a terminal illness, he is behaving one whit more selfishly or less rationally than a supposedly more enlightened or ethically up-to-date patient?

But the panoply of pressures which can confidently be expected extends much further. The opinion of one's doctor, worry over financially or emotionally burdening one's loved ones, the pride of acting as rational and unsuperstitious persons are said to act, these are just a few of the pressures which are bound to infect and distort the system of logical and

autonomous decision-making that the Second Circuit envisions.

The situation will be even worse, of course, with the inevitable expansion of the "right" created by the Court of Appeals. Having concluded that it is inhumane to prohibit a competent and conscious adult patient facing a terminal illness from obtaining immediate release from pain and a diminished life, will the Second Circuit, or other courts, long insist that infant, incompetent, or unconscious patients be condemned to such suffering, simply because they are powerless to make the "rational" decision for themselves? Similarly, will the courts deny self-induced but assisted death to rational persons eager to embrace it, just because they are not terminally ill, or perhaps not even ill at all? And even before the courts act, will individual doctors, nurses, hospitals, parents, and spouses not be tempted (as some surely have been in the past, though without the greater encouragement and protection of a declared constitutional right to assisted suicide) to "push the envelope" of euthanasia, so to speak, in many ways.

The classic cautionary example of this downward progression can be found in the experience of the Netherlands. In the mid-1980s, Dutch courts created exceptions to criminal statutes prohibiting both assisted suicide and euthanasia to permit doctors to engage in both practices, though with the assurance that only consenting patients would "enjoy" these "rights." This regime of toleration of voluntary euthanasia then led fairly quickly to non-voluntary euthanasia, first de facto, and now more or less de jure. Incontrovertible evidence exists that, as a result of abuse by individual family members and physicians, many thousands of Dutch citizens have been killed without their consent. *See* John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope? in Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (1995); John Keown, *Further Reflections on Euthanasia in the Netherlands in the Light of the Remmelink Report and the Van Der Maas Survey*, in *Euthanasia, Clinical Practice and*

the Law (Luke Gormally, ed., 1994). All too predictably, the victims of this downward progression have disproportionately been the most vulnerable members of Dutch society. American legislators who are concerned about protecting the rights of the poor, persons with disabilities, racial minorities, the very young and very old, the sick, the incompetent, and other "at risk" members of our society have ample reason to resist pressures to follow the Netherlands in taking that first step onto this treacherously slippery slope.

Amici, therefore, emphatically do not share the Second Circuit's view that "[i]t is difficult to see how the relief the plaintiffs seek would lead to the abuses found in the Netherlands." *Quill v. Vacco*, 80 F.3d at 730-731. It was exactly such relief that was the starting point in Holland. Under such circumstances, inevitably, it will be persons with disabilities who will be most at risk from the misguided compassion of their relatives and physicians. Their quality of life will be estimated, sadly but resignedly, and in many cases a decision made that a quality so limited cannot justify the prolongation of suffering. Assurances of strict safeguards notwithstanding, the ultimate destination of the trail blazed by the Second Circuit cannot be in doubt.

Moreover, even a passionate believer in the possibility of rigorous safeguards cannot deny that reliance on them entails serious risks. And with that modest recognition, *amici* suggest, there can be no justification for the Second Circuit's conclusion that a state cannot rationally decide to prohibit absolutely an activity with such grave inherent dangers and such high susceptibility of abuse.

II. THE SECOND CIRCUIT'S EQUAL PROTECTION ANALYSIS IS BASED ON A FAULTY LOGICAL EQUATION BETWEEN THE REFUSAL OF MEDICAL TREATMENT AND SUICIDE, HAS NO SOUND BASIS IN CONSTITUTIONAL PRECEDENT, AND UNWISELY ATTEMPTS TO REMOVE FROM DEBATE AND LEGISLATIVE RESOLUTION AN IMPORTANT AND CONTROVERSIAL PUBLIC POLICY ISSUE.

Amici believe that the special contribution which they can offer to the Court's consideration of this case derives from their experience and judgment in protecting the civil rights of all Americans, and especially of those most at risk for violation of their civil rights. In Part I of this brief, *amici* have attempted to present the arguments focused most directly on these concerns, which they feel they have a particular competence to make. Petitioners, and other *amici,* can ably analyze the serious flaws of logic and law and the lack of due regard for the legislative judgment of the people of New York which inform the Second Circuit's opinion. However, *amici* feel obliged to touch briefly on a few of these considerations insofar as they have important, if more indirect, implications for the adequate protection of civil rights.

The foundation of the Second Circuit's reasoning was that no valid distinction can be drawn between a terminally ill patient refusing to commence or continue life-supporting medical treatment and a terminally ill patient choosing to commit suicide. *Quill v. Vacco,* 80 F.3d at 729. The court did not demonstrate this as a conclusion as much as assert it as an incontrovertible proposition. Indeed, the Court of Appeals seemed to have prejudged this issue and to have selected a vocabulary consciously designed to obscure the differences between fundamentally unlike things. It created an artificial likeness between rejecting medical treatment and committing suicide by using the vague and misleading terminology that

each involves a decision to "hasten death." In more straightforward language, the former case entails a choice not to prolong life; the latter entails a choice to cause death.

For centuries, individual thinkers and whole societies have drawn crucial distinctions between all sorts of acts which result in the death of the actor -- from martyrdom in witness to cherished beliefs, heroism in battle, and risking deadly danger to save the lives of others, on the one hand, to the foolhardy commission of great risks for frivolous reasons and the deliberate embrace of death in suicide, on the other hand. Such thinkers and societies have had no trouble in seeing a profound difference between self-killing -- acting to achieve death as one's end and purpose -- and accepting either the inevitability or a high risk of death as a foreseeable consequence of acting to achieve some other end.

The Second Circuit's refusal to see any meaningful distinction between declining medical care and embracing suicide runs counter to the conclusions of unnumbered societies which have had no problem perceiving such a distinction and to a similar long tradition of philosophical reflection by thinkers embracing a wide array of philosophical and moral viewpoints. E.g., Germain Grisez and Joseph Boyle, *Life and Death with Liberty and Justice,* 407-422 (1979) (*see specifically,* Chapter 12, *Moral Responsibilities Toward Human Life,* including the analyses "Suicide and Causing One's Own Death," "Active Euthanasia: Voluntary and Non-Voluntary," "Omissions, Killing and Letting Die," and "Non-Treatment and Refusal of Treatment"); David Novak, *Law and Theology in Judaism,* 100ff (2d Ser. 1976); Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation,* 42 Minn. L. Rev. 969 (1958).

Recently in the United Kingdom, the Select Committee on Medical Ethics of the House of Lords considered carefully "the ethical, legal, and clinical implications of a person's right to withhold consent to life-prolonging treatment" and related

issues of physician-assisted suicide and voluntary euthanasia. The Select Committee's unanimous report affirmed the crucial importance of the very distinctions which the Second Circuit dismissed as meaningless. *Report of the Select Committee on Medical Ethics* (January 1994), *passim*.

While "strongly endors[ing] the right of the competent patient to refuse consent to any medical treatment," the Select Committee concluded that such refusal "is far removed from the right to request assistance in dying." *Id.* at 48. The Select Committee noted the powerful emotional sympathy which anyone must feel for the plight of the desperately ill and appreciated the pain, physical deterioration, disfigurement, and other burdens which they can suffer and which understandably can make them, and their loved ones, long for "a peaceful and easy death." *Id.* These are, of course, the very circumstances which the Second Circuit described in such detail and which seemed to color its views so strongly. *Quill v. Vacco*, 80 F.3d at 720-721. But the Select Committee ultimately concluded that even the combination of such sympathetic considerations and the arguments advanced by proponents of physician-assisted suicide were not:

> . . . sufficient reason to weaken society's prohibition of intentional killing. That prohibition is the cornerstone of law and of social relationships. It protects each one of us impartially, embodying the belief that all are equal. We do not wish that protection to be diminished and we therefore recommend that there should be no change in the law to permit euthanasia.
>
> * * *
>
> One reason for this conclusion is that we do not think it possible to set secure limits on voluntary euthanasia. Some witnesses told us that to legalise voluntary euthanasia was a discrete step which need have no other consequences. But as we said in our

> introduction, issues of life and death do not lend themselves to clear definition, and without that it would not be possible to frame adequate safeguards against non-voluntary euthanasia if voluntary euthanasia were to be legalised. It would be next to impossible to ensure that all acts of euthanasia were truly voluntary, and that any liberalisation of the law was not abused. Moreover to create an exception to the general prohibition of intentional killing would inevitably open the way to its further erosion whether by design, by inadvertence, or by the human tendency to test the limits of any regulation. These dangers are such that we believe that any decriminalisation of voluntary euthanasia would give rise to more, and more grave, problems than those it sought to address.
>
> * * *
>
> We are also concerned that vulnerable people -- the elderly, lonely, sick or distressed -- would feel pressure, whether real or imagined, to request early death. We accept that, for the most part, requests resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life.

Report of the Select Committee at 48-49.

Amici submit that the Select Committee's exceptionally thoughtful consideration of these issues casts a withering light on the Second Circuit's analysis, so very different in depth, quality, and conclusion.

What the Second Circuit's opinion lacks in logical persuasiveness it scarcely makes up in legal analysis. The court cited no precedent for its decision, understandably, since it asserted that "no 'right' to assisted suicide ever has been recognized in any state in the United States." *Quill v. Vacco*, 80 F.3d at 724.[1] However, the court did offer an extended discussion of *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841 (1990), in justification of its contention that physician-assisted suicide cannot be distinguished from refusal of medical treatment. But there the State of Missouri clearly "recognized a right to refuse treatment embodied in the common law doctrine of informed consent," and it just as clearly joined the majority of states in criminalizing assistance in suicide. *Id.* at 268, 280. Still, this Court in *Cruzan* saw no occasion to comment on any glaring logical inconsistency in noting these two policies of the State (though the case, admittedly, involved the different issue of the standard of proof required to demonstrate a comatose patient's wish to forgo life-sustaining food and water, artificially administered), observing rather that there could be "no gainsaying" Missouri's "interest in the protection and preservation of human life," in furtherance of which it could "properly decline to make judgments about the 'quality of life' that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life." *Id.* at 282. *Amici* therefore suggest that *Cruzan* is odd authority for the Second Circuit to cite in support of its conclusion that a state cannot draw rational distinctions between the refusal of medical treatment and assisted suicide.

---

[1] It should be noted, however, that the Eleventh Circuit's *en banc* declaration of a substantive due process liberty interest in physician-assisted suicide had preceded the Second Circuit's decision in *Quill v. Vacco* by only a brief interval. *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995), *rev'd* 79 F.3d 790 (1996) (en banc).

Finally, the Second Circuit deserves criticism for the rashness with which it snatched the issue of physician-assisted suicide from its proper place in the realm of public debate and legislative evaluation and presumed to settle it by declaring a hitherto unrecognized constitutional right. Such intemperate action by the judicial branch has several undesirable effects. It prevents important and controversial issues of public policy from being adequately developed in the give-and-take of the open marketplace of ideas. It deprives the people of their right to reach an ultimate resolution of such issues through the democratic institutions created for that purpose. And, insidiously, it lessens the respect of citizens for the judicial branch of government and fosters an unfortunate perception of the federal courts as elitist bodies where unelected judges enshrine their personal predilections as binding law.

CONCLUSION

Wherefore, for the reasons stated above, *amici* ask that the writ of certiorari prayed for by petitioners should issue.

Respectfully submitted,

William C. Porth
Counsel of Record
James S. Chase
ROBINSON & McELWEE

Counsel for Carl A. Anderson,
Robert P. George, Constance Horner,
Russell G. Redenbaugh,
William B. Allen,
Esther Gonzalez-Arroyo Buckley,
Robert A. Destro and
Evan J. Kemp, Jr.

June 17, 1996